CLERK'S COPY.

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1944

No. 65

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA.

PETITION FOR CERTIORARI FILED APRIL 24, 1944
CERTIORARI GRANTED MAY 29, 1944

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1943

No. 925

THE UNITED STATES OF AMERICA, PETITIONER

vs.

WADDILL, HOLLAND & FLINN, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF APPEALS OF THE STATE OF VIRGINIA

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1 In the Supreme Court of Appeals of Virginia
at Richmond

Record No. 2733

UNITED STATES OF AMERICA, ET AL.

v.

WADDILL, HOLLAND & FLINN, INC., ET AL.

Petition for Appeal from the Corporation Court of the City of Danville, Virginia

Filed May 1, 1943

To the Honorable Chief Justice and Justices of the Supreme Court of Appeals of Virginia:

Your Petitioner, the United States of America, respectfully represents that it is aggrieved by the final judgment entered in the Corporation Court of the City of Danville, Virginia, on the 5th day of January 1943, in the Chancery cause of United States of America, et al., v. Waddill, Holland & Flinn, Inc., et al., by which judgment priority of payment out of the funds in the hands of Earle Garrett, Trustee, was denied your Petitioner.

Statement of Proceedings

Earle Garrett, Trustee under deed of assignment from Oeland R. Roman, filed his bill in chancery in the Corporation Court of the City of Danville, Virginia, praying adjudication of the rights of creditors of assignor in priority of payment from the funds in his hands.

2 The United States, the Unemployment Compensation Commission of Virginia, the City of Danville, Virginia, and Waddill, Holland & Flinn, Inc., filed answers in said cause, each claiming priority of payment out of the funds in the hands of Earle Garrett, Trustee.

A stipulation as to the necessary facts was entered into by counsel.

The Trial Court rendered its opinion November 19, 1942.

Decree was entered January 5, 1943, by the terms of which Earle Garrett, Trustee, was directed to disburse the funds in his hands by payment of the cost of the proceedings with attorney's fee of $100.00, the sum of $222.31 to the City of Danville, and the residue of said funds to Waddill, Holland & Flinn, Inc.

Error assigned

The Trial Court by the entry of its decree of January 5, 1943, erred in failing to recognize and give effect to the right of the United States to have its claim first paid out of the funds in the hands of Earle Garrett, Trustee, as provided by Section 3466, Revised Statutes (31 U. S. C. 191), and before payment of the claims of the City of Danville, and Waddill, Holland & Flinn, Inc.

The facts

Mrs. Oeland R. Roman on June 19, 1941, executed and delivered to Earle Garrett, as Trustee, a deed of assignment for the benefit of assignor's creditors wherein was conveyed all property of assignor, which deed of assignment was on that day recorded in the office of the Clerk of the Corporation Court of the City of Danville. The said deed provided for payment of the creditors in the order of priority as established by the acts of Congress relating to Bankruptcy, namely, 11 U. S. C. 104.

The property assigned in the said deed was located on real estate owned by Waddill, Holland & Flinn, Inc., which corporation levied a distress warrant on July 1, 1941, for accrued rent of $870.00, and on the same day levied an attachment for future installments of rent in the amount of $650.00.

On July 2, 1941, the City Collector of Taxes for the City of Danville distrained the said property for taxes assessed for the years 1939, 1940, and 1941. No sale was held under the proceedings of attachment or distraint. The Trustee on
3 June 26, 1941, sold the property of assignor for the sum of $1,680.80.

The Trustee held the following claims, each demanding priority of payment out of the funds in his hands:

(1) The United States claimed priority to the extent of $1,278.63, with interest at the rate of six per cent per annum from May 21, 1941, which claim represented the amount due and payable on a note signed by Mrs. Oeland R. Roman, the assignor, payable to the American National Bank and Trust Company of Danville, Virginia, and by it assigned to the United States on March 21, 1941.

(2) The United States claimed priority on the sum of $281.00, with interest on $209.30 at the rate of six per cent per annum from December 2, 1941, and interest at the rate of six per cent per annum from February 1, 1942, on $71.70, which sums with interest represented Federal Unemployment Compensation tax due by Mrs. Oeland R. Roman.

(3) The Virginia Unemployment Compensation Commission claimed priority in the sum of $66.38, with interest on $39.75 at the rate of one per cent per mensem from May 1, 1941, and on $26.63 at a like rate of interest from August 1, 1941, representing taxes due by Mrs. Oeland R. Roman.

(4) Waddill, Holland & Flinn, Inc., claimed priority in the sum of $1,500.00, representing as to $850.00 rent due and as to $650.00 rent to become due by Mrs. Oeland R. Roman to the said Corporation for use of a building owned by said Corporation in which Mrs. Oeland R. Roman, the assignor, conducted a restaurant business.

(5) The City of Danville claimed priority in the sum of $222.31 representing taxes due the City of Danville, Virginia, for the years 1939, 1940, and 1941, on furniture and fixtures owned by Mrs. Oeland R. Roman and used in the operation of the said restaurant business.

(6) The Virginia Unemployment Compensation Commission does not claim priority over the claims of the United States.

The argument

It is the belief of the United States that its claims filed with Earle Garrett, Trustee, and heretofore enumerated should have been paid first out of the funds in the hands of the Trustee after payment of the cost of administration of the trust.

4 The basis for this contention is the provision of Section 3466, Revised Statutes (31 U. S. C. 191), which is as follows:

Whenever any person indebted to the United States is insolvent, or whenever the statute of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed.

The framers of the Constitution of the United States, being certain of the fact that the United States would from time to time be called on and required to come into State Courts to protect its interests therein, incorporated in the Constitution Clause 2 of Article VI by which the several states recognized the said Constitution and the laws made pursuant thereto to be the supreme law of the land and bound the judiciary thereto.

Section 3466 of the Revised Statutes of the United States being a Federal statute, the interpretation and construction of same are by accepted judicial practice a matter for the Federal Courts since judicial construction, where the same exists, is considered as much a part thereof as if written into the statute, and is a matter for the judicial branch of the government enacting such statute. With this in view, I desire to point out that the statute is entitled to a liberal construction, as is held in United States v. Johnson, 87 F. (2d) 155.

The effect of State law

The provisions of Section 3466, Revised Statutes, cannot be nullified or limited by State law. This is universally held. The right to priority of payment provided by this section attaches when the conditions specified by this section come into existence, and cannot be impaired or superseded by State law. United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638.

5 *Claims of the United States*

The claim of the United States for $1,278.63, with interest, is a debt assigned by the American National Bank and Trust Company to the United States under the provisions of the Federal Housing Administration Act prior to June 19, 1941, the date of the execution of the deed of assignment, and is a debt due the United States, as contemplated by Section 3466, of the Revised Statutes. See C. F. Korman v. Federal Housing Administration, 113 F. (2d) 743; Wagner v. McDonald, 96 F. (2d) 273; in re Weil, 39 Fed. Sup. 618. The claim of the United States for taxes is likewise a debt due the United States, as contemplated by the aforesaid statute. See Price v. U. S., 269 U. S. 492, 70 L. Ed. 373.

Right of assignor to defeat priority given by section 3466, of the Revised Statutes

An examination of the deed of assignment certified as an exhibit, along with the Record in this case, shows that the grantor therein has attempted to defeat the provisions of Section 3466 of the Revised Statutes by providing for distribution of funds coming into the hands of the trustee "under the acts of Congress relating to bankruptcy," presumably Section 104 of Title 11, United States Code. The effect of distribution under this section would be to defeat the provisions of Section 3466, Revised Statutes, and the priority therein given the United States.

This provision in the deed of assignment is without effect insofar as claims of the United States are concerned for the grantor in a deed of assignment is powerless to do that which the State of Virginia can not do, namely, alter or defeat the provisions of the above-named statute. Further, this statute would be of little value if it were at the mercy of every assignor. The foregoing conclusion is reached in the following cases: In re Kupsbire Coats, 272 N. Y. 221; in re Assignment for Benefit of Creditors of T. J. Simpson, 15 N. Y. S. (2d) 1021. In addition, the Court in the former case made the following applicable statement:

We are of the opinion that all claims of the United States in a voluntary assignment have preference over all other claims, including wages, and that the Bankruptcy Act only applies to cases of bankruptcy and to proceedings in the bankruptcy court, or coming within its jurisdiction.

6 *The debt due United States has priority over claim for rent*

It is the petition of counsel that the above-described claims of the United States have priority over the claim of Waddill, Holland & Flinn, Inc., for rent, and should be first paid out of the funds in the hands of the Trustee.

The said Corporation claims rent in the total sum of $1,500.00, $850.00 of which represents rent past due and $650.00 representing the rent to become due. The said Corporation had distress warrant and attachment for the said sums on July 1, 1941, from the Civil Justice Court of the City of Danville, Virginia.

The right of the United States to preference of payment out of the funds in the hands of the Trustee arose and became fixed on the date of the execution of the deed of assignment and no act thereafter taken by any party could affect its right of preference which attached on that date. See United States v. Oklahoma, supra; Spokane Co. v. United States, 279 U. S. 80, and United States v. Texas, 314 U. S. 480.

On June 19, 1941, Waddill, Holland & Flinn, Inc., not having issued and levied its attachment, had only an inchoate lien on the property involved. See American Exchange Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S. E. 505; and W. T. Grant Co. v. Snead (C. C. A., 4), 37 F. (2d) 705. Such lien can have no effect on the priority established by Section 3466, Revised Statutes, as is held in the following cases: United States v. Kent, 298 U. S. 544, 56 S. Ct. 902, 80 L. Ed. 1321; United States v. Texas, supra.

The Trial Court by its opinion rendered November 19, 1942, and certified as a part of the record of the proceedings in said

Court, dealt at length with the nature of Waddill, Holland & Flinn's claim for rent. This claim being being for rent, the Court determined that the said Corporation held a specific and perfected lien, therefore, on the property assigned to Earle Garrett, Trustee, and, therefore, should be paid first out of the funds in his hands.

Counsel believes that the Trial Court was in error in holding that the said Corporation held a lien on the property of a specific and perfected nature by virtue of its relationship as landlord. It is found at common law that no lien existed in favor of the landlord for rent by virtue of the relationship of landlord and tenant, and that the landlord only had a lien after
7 exercising the right of distraint. See American Exchange Bank v. Goodlee Realty Corp., supra, 9 A. L. R. 300, 32 Am. Juris. 461.

The fact that the landlord's claims for rent age now covered by statute in Virginia (Code of Virginia, Secs. 5523, 5524), does not change the nature of his lien insofar as the facts in this case are concerned. In the above-mentioned case, the American Exchange Bank v. Goodlee Realty Corp., supra, the Court deals at length in comparing the present Virginia statutes on the question with the common law and therein arrives at the conclusion that the nature of the landlord's so-called lien has not been changed.

In holding that the landlord in Virginia has only an inchoate lien prior to the levy of a distress warrant or attachment, Judge Sims in writing the opinion of the Court states at page 215 in the above-mentioned case:

It is true, as urged in behalf of the defendant lienholder in the instant case, that, accurately speaking, neither section 5524 nor section 5523 of the present Code (which were sections 2792 and 2791 of the Code of 1887) gives the landlord any lien for rent (Burks' Pl. & Pr. (1st Ed.), Sec. 13, pp. 12–14); although in some of the cases discussing the subject statutes like section 5524 are referred to as giving the landlord a lien. But it is apparent from the facts of such cases that what is meant thereby is that such statutes give the landlord the right to have the property remain on the premises subject to his inchoate lien unless the terms of the statute permitting removal thereof are complied with. (See Wades v. Figgatt, 75 Va. 575; Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998; Burket v. Boude, 3 Dana (Ky.) 209. Compare Mutual Fire Ins. Co. v. Ward, 95 Va. 231, at page 247, 28 S. E. 209.) In this State the only methods by which a landlord can obtain a lien for rent, prior to a judgment and execution therefor, is by distress warrant or attachment levied on the property liable for rent while it is on the leased premises, or within thirty days after

its removal therefrom. (See chapter 227 and section 6416 of the Code.) Until a lien is thus obtained the landlord's right to a lien is inchoate in this State.

The foregoing quotation is cited with approval in W. T. Grant Co. v. Snead, supra.

This being true, the landlord's lien, if any, as existing on the date of the execution of the deed of assignment, was in-
8 choate and neither specific nor perfected in nature, since the landlord had on that date taken no act to gain nor perfect a lien for rent. In this connection, it should be recalled that the preference of payment given the United States by Section 3466, Revised Statutes, does not give way before any lien which is not specific and perfected in nature on the day when the right of payment to the United States arises, namely, in this case, June 19, 1941. See U. S. v. Knott, supra.

The debt due United States has priority over claim of City of Danville for taxes

It is the position of counsel that the claims of the United States have priority over the claim of the City of Danville for taxes for the following reason:

The right of the United States to payment having attached on June 19, 1941, is superior to the claim of the City of Danville, since the said City's claim for taxes had not been perfected by distraint of the property. Such distraint was not had until July 2, 1941, and any lien which the City may have had at the time of execution of the deed of assignment was inchoate in nature and neither perfected nor specific. Spokane v. U. S., supra, and U. S. v. Texas, supra.

The Trial Court in its aforesaid opinion likewise dealt with the claim of the City of Danville for taxes, and, in final analysis, held the same to be a claim superior to that of the United States, and in its decree entered in this cause directed that the said claim for taxes be paid by the Trustee after payment of cost incident to the administration. What has been said concerning the inchoate nature of Waddill, Holland & Flinn's landlord's lien as applying to the statute on which the United States relies is likewise applicable to the claim of the City of Danville for taxes.

It is found that on June 19, 1941, the City of Danville had not taken steps to perfect any lien which it might have for taxes. Not until July 2, 1941, and after the date on which the right of prior payment was acquired by the United States, did the City distrain the property in question for the amount of taxes due it. The case of United States v. Texas, supra, deals specifically with

the matter of taxes due a State as giving priority over a claim due the United States under Section 3466, Revised Statutes, and specifically holds that any claim for taxes by a state arising on a lien neither specific nor perfected will not take preference over a claim due the United States under the above-mentioned statute.

It is quite obvious in this case that the claim of the City
9 of Danville for taxes was neither specific nor perfected and for that reason the City held no lien which could in any instance give it a right of priority of payment over the United States.

The right of the United States to priority of payment over holders of specific and perfected liens

It will be noted that none of the cases dealing with Section 3466 of the Revised Statutes decided by the Supreme Court of the United States goes so far as to say that the holder of a specific and perfected lien is entitled to preference over the United States.

In the cases of United States v. Texas, supra, New York v. Maclay, 288 U. S. 290, and Spokane Co. v. United States, supra, the Court took pains to make clear that it intended to lend no support to the assumption that the doctrine of the mortgage cases requires the subordination of unsecured claims of the United States to a specific and perfected lien. Reservations of this character in the opinion of the Supreme Court of the United States lend a reasonable basis for the contention that a claim of the United States is entitled to priority under the act in question over any lien, whether or not "specific and perfected."

A transcript of the Record of this suit in the Lower Court and of the official decree therein rendered is herewith exhibited, from which it appears that the Supreme Court of Appeals has jurisdiction.

Counsel for your Petitioner intend to file this petition in vacation at Roanoke, Virginia, with Honorable E. B. Gregory, Justice of the Supreme Court of Appeals, and desire to state orally before said Justice the reasons for reversing the decision and action of the Court hereinabove complained of.

Wherefore, your Petitioner prays that it may be granted an appeal from the judgment of the Corporation Court of the City of Danville, as aforesaid.

UNITED STATES OF AMERICA,
By F. S. TAVENNER, JR.,
United States Attorney.
HENRY T. CLEMENT,
Assistant United States Attorney.

10 *Certificate*

I, the undersigned attorney at law practicing in the Supreme Court of Appeals of Virginia, do certify that in my opinion there is error in the judgment complained of in the foregoing petition for which said judgment should be reviewed and reversed.

Given under my hand at Roanoke, Virginia, this 30th day of April 1943.

F. S. TAVENNER, JR.

Certificate

I, Henry T. Clement, do hereby certify that copies hereof have this day been mailed to the following opposing counsel in the Trial Court: Crews & Clement, attorneys for Waddill, Holland & Flinn, Inc., Danville, Va.; E. Walton Brown, attorney for the City of Danville, Danville, Virginia; Calvin Berry, attorney for Earle Garrett, Trustee, Danville, Virginia; and Kenneth C. Patty, attorney for the Unemployment Compensation Commission of Virginia, Richmond, Va.

Given under my hand at Roanoke, Virginia, this 30th day of April 1943.

HENRY T. CLEMENT.

[File endorsement omitted.]

Appeal and Supersedeas granted. Bond $300.00. May 13, 1943.

H. B. G.

Received May 14, 1943.

M. B. W.

In Corporation Court of City of Danville

Be it remembered that on the 20th day of April 1942, came Earle Garrett, Trustee, under general deed of assignment
11 from Mrs. Oeland R. Roman, trading as Roman's Restaurant and filed his petition in the Corporation Court of Danville, and of The United States of America, Unemployment Compensation Commission of Virginia, The Chesapeake and Potomac Telephone Company of Virginia, Hotel Burton, Metro Products Company, the Register Publishing Company, Patton, Temple & Williamson, Incorporated, City of Danville, Danville, Virginia, Stratford College, J. P. Wells, American National Bank & Trust Company and Philip Greenberg Market against Waddill, Holland & Flinn, Incoporated, a partnership trading as Hotel Burton, S. Gumpert Company, Incorporated, and National Outdoor Advertising Corporation in the following words and figures, to wit:

Petition

Filed April 20, 1942

To the Honorable HENRY C. LEIGH, *Judge of said Court:*

Your petitioner, Earle Garrett, shows unto the Court as follows: That he was made trustee under a General Deed of Assignment for the benefit of creditors by deed dated June 19, 1941, by Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, which said General Deed of Assignment was recorded in Your Honor's Court on June 19, 1941; that said Deed of Assignment contained among other provisions, the following:

"Said Trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and after satisfying the landlord's lien for rent, the balance shall be distributed pro rata among all creditors of said party of the first part, without preference or priority.

In the execution of this trust said trustee shall have all of the rights and authority, and be subject to all of the duties
12 imposed by Chapter 213A of the Code of Virginia.

This assignment is made with the distinct understanding that all creditors of said party of the first part who accept the benefits of this trust do so in full satisfaction of their respective claims, and shall be forever barred from further recovery of any balance."

A copy of said general deed of assignment is filed herewith marked "Exhibit General Deed of Assignment" for the benefit of creditors.

Pursuant to said General Deed of Assignment, the trustee named therein proceeded to execute the terms thereof and did sell at public auction the property set out in said Deed of Assignment on June 26, 1941, the proceeds from said sale amounting to a total of $1,680.80.

The trustee under said Deed of Assignment has expended the following sums: To C. Stuart Wheatley, Clerk, costs $6.60; Registered Letters to creditors $2.10; labor, inventory and preparation of items for sale, $29.00.

That there are various creditors claiming priority in the distribution of the assets in the hands of Earle Garrett, Trustee, as

hereinafter set out; that various creditors who claim priority are seeking to hold said trustee personally liable if their claims are not recognized as having priority over all other creditors; that if said trustee should pay out the proceeds in his hands to one or more creditors claiming priority, he would not have a sufficient amount remaining to pay other creditors who claim priority in the distribution of said assets.

That the United States through N. B. Early, Jr., Collector of Internal Revenue, claims priority for the Federal Unemployment Compensation tax as follows: (a) Compensation tax—

$281.09+$5.19	$286.28	
Federal Unemployment Compensation Tax for 1940	$209.39	
With interest from 12/2/41 to April 8, 1942		$4.39
Federal Unemployment Compensation Tax for 1941	$71.70	
With Interest from 2/1/42 to April 8, 1942		$0.80
	$281.09	$5.19

13 as shown by claim filed herewith as "Exhibit N. B. Early, Jr., No. 1;" that the United States through N. B. Early, Jr., Collector of Internal Revenue, claims priority for Federal Insurance contributions tax and Federal Unemployment tax as follows:

(b) Federal Insurance and Unemployment Tax $66.45+$2.36		$68.81
With interest on $58.48, a part thereof, from 8/15/41	$2.27	
With interest on $7.97 from 2/1/42	.09	
	$2.36	

as shown by "Exhibit N. B. Early, Jr., No. 2" filed herewith; that the United States through Perry M. Armstrong, Attorney for the Federal Housing Administrator claims priority for the United States in the sum of $1,278.63 with interest at the rate of 6% per annum from March 21, 1941, under Title 31, Chapter 6, Section 191, U. S. Code, as shown by "Exhibit Perry M. Armstrong, No. 1," filed herewith; that the State of Virginia through Edwin S. Reid, Chairman, claims priority for the Unemployment Compensation Commission as follows:

(c) State of Virginia Unemployment Compensation Commission $66.38+$0.55		$66.93
With interest on $39.75, a part thereof, from May 1, 1941, 1% per month until paid	$0.37	
And on $26.63 from August 1, 1941	.18	
	$.055	

under and by virtue of the provisions of Section 1887 (106c) of the 1940 supplement to the Code of Virginia, as shown by Exhibit Unemployment Compensation Commission of Virginia No. 1 filed herewith; that W. L. Gibson, City Collector, claims prio*rotu* for the city of Danville on taxes due in the sum $300.55 as shown by Exhibit W. L. Gibson No. 1 filed herewith.

14 That other claims filed with the trustee under said Deed of Assignment within 60 days from recordation of same on June 19, 1941 are as follows:

C. & P. Telephone Company	$22.94
S. Gumpert Company, Inc.	21.82
National Outdoor Sign Co.	300.00
Hotel Burton	15.83
Metro-Products Company	9.00
Register Publishing Company	50.58
Patton, Temple & Williamson, Inc.	216.18
City Water, Gas & Electric Dept.	227.09
Stratford College	6.00
J. P. Wells	430.70

Your petitioner further shows that the claim of the United States (Exhibit N. B. Early, Jr., No. 1) for $281.09 was not filed within 60 days from June 19, 1941, the date of recordation of said General Deed of Assignment. Nor was the claim of the United States (Exhibit Perry M. Armstrong No. 1) for $1,278.63 with interest at 6% per annum from March 21, 1941, filed within 60 days from June 19, 1941.

Your petitioner further shows that the above constitute all of the creditors of Roman's Restaurant known to your petitioner, with the exception of Waddill-Holland & Flinn, Inc. Agents for Waddill-Holland & Flinn, *Ltd.* partnership trading as Hotel Burton, which refuses to come in under said General Deed of Assignment and are asserting a claim as landlord in the sum of $650.00 for rent alleged to be due and payable on the building formerly occupied by Roman's Restaurant. Said landlord also contends that it has a preference and priority as to the funds in the hands of your petitioner as trustee under said General Deed of Assignment. Said landlord has heretofore, through Crews & Clement, its attorneys, obtained a Distress Rent Warrant dated July 1, 1941, and an attach*em*nt dated July 2, 1941, both having been issued from the Civil Justice Court of Danville, Virginia, copies of which are filed herewith marked Exhibit Distress Rent Warrant and Exhibit Attach*em*nt. Your petitioner understands that said landlord is making a cl*ai*m for a period of six months under the Virginia Statute. The levy of the Distress Rent Warrant and Attachement was made by the Constable before the sale of the Trustee but after recordation of the General Deed of Assignment.

15 Expenses of Sale are as follows:

Lavinder & Howze, one 3 x 6 banner	$5.00
J. D. Ley, Inc. auctioneer fee	75.00
Register Publishing Company	17.70
Danville Printing Company	5.61
City of Danville, Electric Dept.	3.77

Other general creditors known to your petitioner are as follows:

American National Bank & Trust Company, Danville, Virginia, note endorsed by Isaac Harris and Moses Roman	$110.00
Phillip Greenberg Market—account	80.00
American National Bank & Trust Company, Danville, Virginia, two notes aggregating	415.70

It is obvious therefore that there is a conflict among the creditors as to the question of priority of payment from the proceeds now in the hands of your petitioner as trustee; that certain creditors are seeking to hold your petitioner as trustee personally liable for the disposition of the proceeds in the hands of your petitioner as trustee; that your petitioner is advised that under the circumstances he has a right to petition the court for advice in order that said petitioner as trustee may properly distribute the proceeds now in his hands and to releave him of any personal liability in this matter; your petitioner therefore prays that this court will take cognizance of the facts and advise him as to the proper distribution of the funds now in his hands as trustee under the above mentioned General Deed of Assignment for the benefit of the creditors; that counsel may be allowed reasonable fee for his services in this cause and your petitioner will ever pray, etc.

EARLE GARRETT,

Trustee under General Deed of Assignment for the benefit of the creditors from Mrs. Oeland R. Roman.

CALVIN W. BERRY,

Calvin W. Berry, *Counsel.*

16 *Memorandum.*

After recordation of deed and before goods on these premises were sold Waddill-Holland Company, landlord, levied distress warrant for rent and gave Trustee notice of this distress and of attachment for rent to become due.

Deed provides for payment of preferred claims in accordance with Bankruptcy Acts.

Waddill-Holland Company did not prove claim with Trustee but stands on its distress warrant and attachment.

Section 64 (Title II, Section 104, U. S. C. A.) of Bankruptcy Act provides, 1st, for payment of costs of administration and expenses of sale, 2nd, wages not to exceed $600.00 to each claimant (none claimed), 3rd, not applicable here, 4th, taxes legally due and owing by the bankrupt to the United States or any State or any subdivision thereof, 5th, debts owing to any person, including the United States, who by the laws of the United States is entitled to priority, and rent owing to a landlord who is entitled to priority, by applicable State laws. Rent claim restricted to rent owing for

actual use and occupation of premises which accrued within three months before date of bankruptcy.

In re distribution of assets of Roman's Restaurant

Earle Garrett, Trustee under Deed of Assignment, received from sale gross amount of		$1,680.80
Cost of Administration:		
Labor, Inventory, Marking goods, etc. preparatory to sale	$29.00	
C. Stuart Wheatley, Clerk, recording Deed of Assignment	6.60	
Postage Stamps, Notices to Creditors	2.10	
Brown & Garrett, Attorneys; Writing Deed of Assignment	25.00	
Trustee's Compensation, five per cent Commission	84.04	
	$146.74	
Expenses of Sale:		
Lavinder & Howze, painting sale signs	5.00	
J. D. Ley, Auctioneer	75.00	
Register Publishing Company, advertising	17.70	
Danville Printing Company, Handbills	5.50	
City of Danville, Lights	3.77	
	$106.97	
Balance (For distribution less cost of petition and proceeding in Corporation Court of Danville		$1,427.09
Rent claimed by Waddill-Holland Company, Incorporated		650.00

(If this claim is a valid lien it has priority.)

Next under Paragraph 4 of 64 Bankruptcy Act comes taxes legally due and owing by bankrupt to the United States or any States or subdivision thereof. Under this item, taxes due United States,

a. Compensation Tax, $281.09 + $5.19			$286.28
Federal Unemployment Compensation, Tax for 1940	$200.39		
With Interest from 12/2/41 to April 8, 1942		$4.39	
Federal Unemployment Compensation, Tax for 1941	71.70		
With interest from 2/1/42 to April 8, 1942		0.80	
	$281.09	$5.19	
b. Federal Insurance and Unemployment Tax, $66.45 + $2.36			$68.81
With interest on $58.48, a part thereof, from 8/15/41		$2.27	
With interest on $7.97 from 2/*/42		.09	
		$2.36	
c. State of Virginia Unemployment Compensation Commission $66.38 + $0.55			$66.93
With interest on $39.75, a part thereof, from May 1, 1941		$0.37	
1% per month until paid—And on $26.63 from August 1, 1941		.18	
		$0.55	
d. City of Danville, Taxes due			$300.55

If there is a balance it would be payable as *as* credit on Federal Housing Administration loan which is a debt due the United States of America amounting to $1,278.63—principal.

Deed of assignment

This general deed of assignment for the benefit of creditors made this 19th day of June 1941, by and between Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, Danville, Virginia, party of the first part, and Earle Garrett, Trustee, party of the second part, witnesseth:

That said party of the first part doth grant unto said party of the second part, trustee as aforesaid, all of the following described personal property located in the storehouse known as 510 Main Street, Danville, Virginia, heretofore used by the party of the first part in the conduct of a restaurant business under the trade name aforesaid, to wit:

All trade fixtures, one soda fountain and appliances, all restaurant and kitchen furniture, appliances and utensils, all plate and silverware, cash register, kitchen range and gas stove in kitchen, steam table in kitchen, two refrigerators, one combination water and milk cooler, coffee urns, electric sign, and all other tangible personal property located in said storeroom, or used in connection with said business, and all other assets of every kind and description now belonging to said party of the first part.

In trust, however, for the following uses and purposes,
19 to wit:

Said Trustee shall at once take charge and possession of all the property and assets hereby conveyed, make an inventory thereof, proceed to collect all choses in action, if any, and make sale of said property at public auction, after reasonable notice; provided that at least 10 days before such sale he shall mail a registered letter or notice to each of the creditors named in said deed, advising of the execution thereof, and stating therein the time, place and manner of sale, and the terms thereof, and stating also that this deed of assignment provides that acceptance hereunder by any creditor shall be in full satisfaction of his claim.

Said trustee shall, upon converting the above personal property and assets into cash, pay the cost of executing and recording this deed; the expenses of this trust, including a fee of $25.00 to Brown & Garrett, Attorneys, for drawing this deed of assignment, and five percentum to the trustee for his services hereunder, which is deemed to be reasonable compensation therefor.

Said trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only

such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and after satisfying the landlord's lien for rent, the balance shall be distributed pro-rata among all creditors of said party of the first part, without preference or priority.

In the execution of this trust said trustee shall have all of the rights and authority, and be subject to all of the duties imposed by Chapter 213A of the Code of Virginia.

Creditors shall have 60 days from the date of the recordation of this deed within which to prove and file their claims before the trustee, and after such time said trustee shall have full power to make distribution to those creditors who have filed and proved their claims with him, and said trustee shall not be liable to any creditor who has failed or neglected to prove his claim within said period of 60 days, or before distribution is made by said trustee hereunder.

This assignment is made with the distinct understanding that all creditors of said party of the first part who accept the benefits of this trust do so in full satisfaction of their respective claims, and shall be forever barred from further recovery of any balance.

It is the intention of this deed to secure all creditors, whether listed hereunder or not. The names of the creditors of the party of the first part so far as is known are as follows:

Federal Housing Authority, Equitable Building, Baltimore, Md., Acct	$1,278.63
Patton, Temple & Williamson, Inc., Danville, Va.—Acct	216.18
W. L. Gibson, City Collector, 1939 Taxes due City of Danville; 1940 taxes due	117.24
Collector of Internal Revenue—Social Security tax (estimated)	54.08
Treasurer of Virginia—Unemployment Compensation liability (estimated)	63.64
National Outdoor Sign Co., Atlanta, Ga.—acct	79.50
American National Bank & Trust Company, Danville, Virginia, note endorsed by Isaac Harris and Moses Roman	332.00
Phillip Greenberg Market—account	110.00
City of Danville Water, Gas & Electric Depts	80.00
Waddill-Holland & Flinn, Inc., landlord—rent claim	109.26
Chesapeake & Potomac Telephone Co.	
Register Publishing Company—acct	21.00
S. Bumpert Co., Ozone Park, N. Y.—acct	43.45
Metro-Products Co., 57 Ellis St. N. E., Atlanta, Ga.—account	21.82
American National Bank & Trust Company, Danville, Virginia, two notes aggregating	9.00
	415.70
	$2,951.50

Witness the following signature and seal.

---------- ---- -- ------, [SEAL]

Doing business under the trade name of Roman's Restaurant.

21 STATE OF VIRGINIA,

City of Danville, to wit:

I, Eva W. Sneed, a Notary Public in and for the City of Danville, in the State of Virginia, do hereby certify that Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant, whose name is signed to the foregoing writing bearing date the 19th day of June, 1941, has acknowledged the same before me in my city and state aforesaid.

My Commission expires February 20, 1945.

Given under my hand this 19th day of June, 1941.

——— ———, *Notary Public.*

DEPARTMENT OF JUSTICE

UNITED STATES ATTORNEY

Western District of Virginia

ROANOKE, VA.

AUGUST 7, 1941.

Re: Mrs. Oeland R. Roman, T/a Roman's Restaurant,
Danville, Va.

MR. EARLE GARRETT,

Attorney at Law, Danville, Virginia.

DEAR MR. GARRETT: I have received from Mr. N. B. Early, Jr., Collector of Internal Revenue, copy of your letter of July 24, 1941, in regard to attachments for rent on proceeds of the sale of property of the above-named assignor in your hands.

I understand that Mr. Early has heretofore filed with you a proof of the claim of the United States covering Federal Insurance Contributions and Unemployment Tax.

The government claims that its tax debt takes priority over landlord's lien for rent. I call your attention to the following authorities:

31 U. S. C. A. 191, 192.

42 U. S. C. A. 1101, 1102.

U. S. v. Oklahoma, 261 U. S. 253.

22 U. S. v. Butterworth, 269 U. S. 504.

Hatch v. Morasco Holding Co., 661 F. (2d) 914 (*certiorari* denied, 288 U. S. 613).

Thelusson v. Smith, 2 Wheat. 396.

North River Coal Co. v. McWilliams Brothers, 59 F. (2d) 797.

New York v. McClay, 288 U. S. 290.

You will observe that Section 192, of 31 U. S. C. A., places upon you personal liability in the event you do not give to the claim of the United States the priority to which it is entitled.

Very truly yours,

R. R. RUSH,
R. Roy Rush,
Assistant United States Attorney.

Copy to:
Honorable N. B. EARLY, Jr.,
Collector of Internal Revenue, Richmond, Virginia.

COMMONWEALTH OF VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

RICHMOND

JULY 29, 1941.

Re Mrs. Oeland R. Roman, Trading as Roman's Restaurant

Mr. EARLE GARRETT,
Attorney-at-Law,
Masonic Building, Danville, Virginia.

DEAR MR. GARRETT: I enclose herewith proof of claim in the amount of $66.38, with interest on $39.75 from May 1, 1941 at the rate of one percent per month until paid and on $26.63 from August 1, 1941 at the rate of one percent per month until paid.

I have received your letter of July 24, 1941, in which you state that the landlord has served a distress warrant upon you as trustee for $250.00 a month rent from April 1, 1941 to July 1, 1941 and also that an attachment has been issued for $650.00 additional rent. I note that you have in your hands $1,670.65 for distribution subject, of course, to administrative charges.

Since the tax due the Unemployment Compensation Commission is, by virtue of the provisions of Section 1887 (106c) of the 1940 Supplement to the Virginia Code; entitled to priority over "all claims of lien and general creditors" of course it makes no difference to me what the judgment of the Trial Justice may be with respect to the attachment and the distress warrant because any lien obtained by the landlord would be subsequent to the statutory lien for the tax due the Commission. You will note in the above section of the Code referred to that the last part of that Section is as follows:

"Nor shall anything herein be construed to affect the priority of any mortgage, deed of trust, or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

It will be noted from the proof of claim which I am forwarding to you that the contributions or taxes due to the Commission first accrued in January, 1941, and, therefore, prior to any possible lien for rent.

Even under Section 64 (1) of the Bankruptcy Act the taxes due the Commission would have priority over the rent. You will note that the section of the Unemployment Compensation Act referred to above is similar to Section 429 of the Tax Code prior to the time it was amended. The United States Circuit Court of Appeals in the case of Grant v. Snead, 37 Fed. (2) 705 held that under Section 429 of the Tax Code of Virginia that taxes were ahead of an inchoate lien for rent. You, of course, are familiar with the case of American Exchange Bank v. Goodloe Realty Corporation, 135 Va. 204, 116 S. E. 505, in which it was held "in this State the only methods by which the landlord can obtain a lien for rent, prior to a judgment and an execution therefor, is by distress warrant or attachment levied on the property liable for rent, while it is on the leased premises or within thirty days from its removal therefrom. See Chapter 222 Section 6416 of the Code. Until a lien is thus obtained the landlord's right to a lien is inchoate in this State."

I will be glad if you will advise me whether or not you agree with me that the taxes due this Commission have priority over the rent either for six months or three months and that any
24 judgment that may be entered by the Trial Justice or any Court for such rent will be subordinate to our claim for taxes.

With respect to the interest rate of 1% per month you are referred to the case of U. S. v. Childs, 266 U. S. 304, 45 Supreme Court Reporter 110, which holds that no part of the 1% interest is a penalty. This, however, only applies to bankruptcy and I don't suppose anyone would dispute the fact that under Section 1887 (106) (a) past due taxes due the Unemployment Compensation Commission bear interest at the rate of 1% per month from the due date until payment.

Very truly yours,

KENNETH C. PATTY,
Kenneth C. Patty.
Assistant Attorney General,
Box 1358.

kcp: mkc
enclosure.

COMMONWEALTH OF VIRGINIA

OFFICE OF THE ATTORNEY GENERAL

RICHMOND

JULY 3, 1941.

Re Mrs. Oeland R. Roman, Trading as Roman's Restaurant, Danville, Va.

Mr. EARLE GARRETT,
Trustee,
618 Masonic Building, Danville, Virginia.

DEAR MR. GARRETT: Reference is made to your letter of June 26, 1941 to the Unemployment Compensation Commission of Virginia, advising that Mrs. Oeland R. Roman, trading as Roman's Restaurant, has executed a deed of assignment to you as trustee.

I desire to call your attention to Section 14 (c) of the Virginia Unemployment Compensation Act, copy of which is enclosed herewith, which reads as follows:

"Priorities under legal dissolutions or distributions.—In the event of any distribution of any employer's assets, contributions then or thereafter due shall be paramount and prior to all claims of lien and general creditors, except claims given higher dignity by Federal Law. Nothing in this section shall be construed in derogation of any lien of the Commonwealth or any of its political subdivisions now existing or hereafter created by law; nor shall anything herein be construed to affect the laws now in force with regard to marshaling a decedent's estate and in regard to the exemption of a poor debtor; nor shall anything herein be construed to affect the priority of any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

Under this section the taxes due the Unemployment Compensation Commission have priority over all claims of lien and general creditors except mortgages and deeds of trust and other liens duly perfected prior to the date any part of the tax first accrued. Of course, you will ascertain the status of the other claims and see to it that the claim for taxes under the Unemployment Compensation Act is satisfied in full before any distribution is made to the other creditors.

I am having the Auditing Department of the Commission furnish me with a statement showing the amount of tax due by this concern and as soon as that information is received, I will have

prepared and executed by the Commission a formal proof of claim and will mail it to you.

Very truly yours,

KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General,
Box 1358.

kcp: mkc.

In Corporation Court of City of Danville

Second petition

To the Honorable HENRY C. LEIGH, *Judge of said Court:*

Your petitioner, Earle Garrett, shows unto the Court as follows:

That he has heretofore filed a petition in Your Honor's
26 Court for the purpose of obtaining the advice of the Court as to the proper manner of distributing the proceeds now held by said Trustee in the matter of Mrs. Oeland R. Roman, doing business under the trade name of Roman's Restaurant.

That your petitioner has since been advised and herewith alleges that it would be to the interest of all parties concerned that said petition be treated as a bill in chancery and that the Court render a declaratory opinion setting forth the respective rights and liabilities of the parties to said petition.

That, therefore, your petitioner has obtained the written consent of both the general creditors and also those claiming priority, as shown by written statements attached hereto, with the exception of Waddill, Holland & Flinn, Incorporated, trading as Hotel Burton, S. Gumpert Company, Incorporated, and National Outdoor Sign Company.

Your petitioner, therefore, prays that the petition may be treated as a bill in chancery; that proper process may issue; that the parties set out above may be made parties plaintiff and defendant respectively under the name as above set out; that the said defendants be required to file their respective answers to said bill, but answer under oath is hereby waived; that said Court may render a declaratory opinion setting forth the respective rights and liabilities of all parties to this action and advise the Trustee herein as the proper manner of distributing the proceeds now in his hands as Trustee; that a reasonable fee be allowed Counsel for his services in connection with the preparation of this suit; and that your petitioner may be given such other, further and general relief in

the premises as the nature of the case may require and to equity may seem meet.

And your petitioner will ever pray, etc.

EARLE GARRETT,
Trustee under General Deed of Assignment from Mrs. Oeland R. Roman, trading as Roman's Restaurant.
CALVIN W. BERRY, *Counsel.*

27 In Corporation Court of City of Danville

Answer of Waddill, Holland & Flinn, a partnership trading as Hotel Burton

The answer of W. W. Waddill, C. G. Holland, and C. M. Flinn, a partnership trading as Hotel Burton, for answer to the petition, or so much thereof as it is advised it is necessary to answer, filed by Earle Garrett, Trustee, in the above-styled cause, answering, says:

This respondent admits that it refused to come in under the general deed of assignment, as alleged in said petition, and that it asserts a claim as landlord for $1,500.00 for rent due and to become due by virtue:

1. Of a distress warrant for $850.00 for rent due as of July 1, 1941, said distress warrant levied as of said date of July 1, 1941.

2. And for $650.00 for rent claimed under attachment issued by the Civil Justice of Danville, July 2, 1941, and duly levied on said date of July 2, 1941.

This respondent claims priority by virtue of the levy of said attachment and distress warrant over all other claims of whatsoever nature against the funds now held by Earle Garrett, Trustee, which said funds are the proceeds of sale of property on said premises leased by this respondent to Mrs. Oeland R. Roman, and the sale having been made after levy of said distress and attachment.

And now, having fully answered said petition, respondent prays to be hence dismissed with its reasonable costs by it in this behalf expended.

W. W. WADDILL,
C. G. HOLLAND,
C. M. FLINN,
A partnership trading as Hotel Burton,
Respondent.

CREWS & CLEMENT.

In Corporation Court of City of Danville

The Unemployment Compensation Commission of Vir-
28 ginia, an instrumentality of the Commonwealth of Virginia, by the Attorney General, reserving unto itself all just exceptions to the petition filed in this cause, this day appeared and tendered its answer to said petition and asked leave to file the same, which leave of Court is hereby granted, and said answer is accordingly filed.

Answer of Unemployment Compensation Commission of Virginia

(Filed April 28, 1942)

The Unemployment Compensation Commission of Virginia, for answer to the petition, or so much thereof as it is advised it is necessary to answer, filed by Earle Garrett, Trustee, in the above styled cause, answering, says:

1. That Respondent is an instrumentality of the Commonwealth of Virginia.

2. That Respondent, on behalf of the Commonwealth of Virginia, is required to levy and assess payroll taxes on all wages paid by employers to individuals in their employment as defined in the Unemployment Compensation Act of Virginia.

3. That from January 1, 1941, to the date the assignment mentioned in the petitioner's bill, Mrs. Oeland R. Roman, trading as Roman's Restaurant, was an employer under said Unemployment Compensation Act and that tax in the principal amount of $66.38, with interest at the rate of one per centum (1%) per month on $39.75, a part thereof, from May 1, 1941, until paid, and with interest at one per centum (1%) per month on $26.63, the residue thereof, from August 1, 1941, until paid, and that no part of said tax or the interest thereon has been paid to this respondent.

4. Respondent, further answering says, that, in this instance it is not disputed by respondent that the tax due N. B. Early, Collector, and the debt due The Federal Housing Administrator have priority over the taxes due this respondent and the City of Danville. (Section 3466 of the United States Revised Statutes; Spokane County v. United States, 279 U. S. 90.)

5. Respondent, further answering says, that a part of the taxes due respondent first accrued on January 1, 1941, and that said claim for taxes has priority over all claims for taxes in favor of the City of Danville, and avers and alleges that the taxes claimed by the City of Danville were not duly perfected liens against any of the assets of the Assignor on January 1, 1941.

6. Respondent, further answering avers and charges that
29 the claim asserted by Waddill-Holland Company, for rent, was not a lien against the assets and property of the Assignor on January 1, 1941, and, therefore, the claim of respondent for taxes has priority over said landlord's claim. (Section 1887 (106) (c) Virginia Code Supplement 1940, as amended, Acts of General Assembly, 1942, Chapter 317, effective March 30, 1942).

And now, having fully answered said petition, respondent prays that to be hence dismissed with its reasonable costs by it in this behalf expended.

UNEMPLOYMENT COMPENSATION
COMMISSION OF VIRGINIA,
Respondent.

KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General of Virginia,
Counsel for Respondent.

In Corporation Court of City of Danville

On motion of the United States, made by Henry T. Clement, Assistant United States Attorney for the Western District of Virginia and for good cause shown the United States is dismissed as a party plaintiff to this action and is given leave to file its answer herein as a party defendant which is accordingly done.

Answer of United States

Filed May 9, 1942

The answer of the United States to a Bill of Complaint filed against it, and others, in the Corporation Court of the City of Danville, Virginia, by Earle Garrett, Trustee, and others.

This respondent reserves to itself the benefit of all just exceptions to the said Bill of Complaint, for answer thereto or to so much thereof, as it is advised that it should answer, *answer* and says:

Respondent admits the allegations contained in the Bill of Complaint.

The United States is not bound or required to file, within
30 sixty days, its claim for payment of debt with Earle Garrett, Trustee. Your respondent further avers that its claim in the amounts set-forth in the Bill of Complaint, should be paid first out of funds in the hands of the Trustee, after the payment of the cost of administration; that under the provisions of Section 3466 of the Revised Statutes (31 USC 191) the payment of your respondent's claim is fixed by statute.

And now having fully answered the complainants' bill, your respondent prays to be hence dismissed with his cost in this behalf, expended.

UNITED STATES
By HENRY T. CLEMENT,
Henry T. Clement,
Assistant United States Attorney.

In Corporation Court of City of Danville

Stipulation as to certain facts

Whereas the Honorable Henry C. Leigh, Judge, has addressed a letter to counsel for Earle Garrett, Trustee, requesting certain information with reference to the following facts:

(1) The date on which the Trustee took possession of the property;

(2) The date on which the Trustee sold said property at auction;

(3) The date on which the attachment of the landlord for future rent was levied;

(4) The date on which the levy was made for the City of Danville for taxes due;

(5) The date on which the tenancy of Mrs. Ola R. Roman, trading as Roman's Restaurant, begin;

(6) Whether or not the landlord has regained possession of the premises within the period for which future rent was claimed;

(7) The reason why the attachment of the landlord was not pursued;

(8) Necessary exhibits from the tax books to show what property was assessed by the City of Danville;

Whereas all of this information is a matter of record except with reference to the stipulation between Earle Garrett, Trustee under Deed of Assignment, and Grasty Crews, Counsel for the landlord, it is deemed advisable in order to save unnecessary
31 expense that a stipulation between counsel be entered into setting forth the information requested by the Court instead of having an order of reference and further depositions;

It is therefore stipulated that the following are the true facts and it is further stipulated and agreed that they be incorporaetd and made a part of the record in this case:

(1) The trustee took possession of the property June 19, 1941.

(2) The trustee sold the property at auction July 12, 1941.

(3) The attachment of landlord for future rent was levied 1st July, 1941.

(4) The levy of City for taxes was made 2nd July, 1941.

(5) Mrs. Roman's tenancy began 1st Jan. 1937, term of 5 years at $250.00 per month.

(6) Has landlord regained possession of premises within period for which future rent was claimed?

The Trustee turned the keys over to the landlord shortly after July 12, 1941. Attempt was made to rent the property but it has not been rented, but has been continuously vacant since the day that it was vacated by Roman's Restaurant.

(7) The attachment was not pursued because Earle Garrett, Trustee entered into a stipulation with counsel for the landlord in order to save costs by virtue of which the sale could proceed despite the levy of distress warrant and levy of the attachment without losing any rights by the landlord as to the lien on the property sold for either the attachment or the distress warrant.

(8) Exhibits from Tax Books to show what property was assessed by City. These have been procured by the Trustee and are now in his possession and will be attached to this stipulation and made a part thereof.

EARLE GARRETT, *Trustee.*
By CALVIN W. BERRY, *His Counsel.*
GRASTY CREWS, *Counsel for Waddill, Holland & Flinn, Incorporated, Landlords.*

UNITED STATES.
By HENRY T. CLEMENT,
Henry T. Clement,
Assistant United States Attorney.

32 UNEMPLOYMENT COMPENSATION COMMISSION OF VIRGINIA, *Respondent.*
By KENNETH C. PATTY,
Kenneth C. Patty,
Assistant Attorney General of Virginia, Counsel for Respondent.

CITY OF DANVILLE,
By E. WALTON BROWN,
E. Walton Brown, *City Attorney.*

In Corporation Court of City of Danville

Re Earle Garrett, Assignee of Mrs. Oeland R. Roman, Trading as Roman's Restaurant.

Opinion

November 19, 1942

The facts appearing from the pleadings in the cause and the stipulations of Counsel are these:

On June 19th, 1941, Assignor executed and delivered to the Trustee a deed of assignment for the benefit of her creditors,

which was duly admitted to record on the same date. By it she transferred and assigned all of the property owned by her which was used in connection with the business which she conducted under the style of Roman's Restaurant.

The deed of assignment contains this provision:

"Said trustee shall only recognize and pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof, if any, and those having a lien shall be preferred only to the extent of the value of the property upon which they have a lien. It being the intention of the party of the first part to provide for the expeditious settlement of this trust and to allow only such preferences and priorities as are now required or allowed under the acts of Congress relating to bankruptcy. After paying all preferred and lien creditors, and satisfying the landlord's lien for rent, the balance shall be distributed pro rata among all creditors of said party of the first part without preference or prioity."

Assignor's place of business was leased from Waddill-Holland and Flinn, Inc. The rent in question was reserved by contract. The lease was for a period of five years beginning January 1st, 1937.

The property assigned remained on the leased premises
33 and was sold by the Trustee on July 12th, 1941, without being removed therefrom by him.

The United States claims priority under Section 3466 R. S.; Title 31, U. S. C. A., Sec. 191, for Federal Unemployment Compensation Taxes for the year 1940 in the sum of $209.30, with interest thereon from December 2, 1941, at the rate of six per centum per annum. And for a like tax incurred in 1941 in the sum of $71.70, with like interest from February 1, 1942.

The United States also claims priority in the sum of $1,278.63, with interest at six per centum per annum from March 2, 1941. This claim arose out of a transaction of the Federal Housing Administration and accrued to the government on March 2, 1941.

Virginia Unemployment Compensation Commission claims priority over the landlord's rent claim and the City of Danville's claim for taxes, but concedes priority to the federal government. Its claim is based on taxes on the wages of the Assignor's employees paid prior to the delivery of the deed of assignment, and is in the sum of $66.38, with interest on $39.75 thereof at the rate of one per centum per mensem from May 1, 1941, and on $26.63, with like rate of interest from August 1, 1941, until paid.

On July 1, 1941, the landlord had issued and levied on the property assigned a warrant for distress for three and two-fifths months' past due rent amounting to $850.00.

On July 1, 1941, the Landlord had issued and levied on the same property an attachment for future installments of rent due under its contract of lease. The amount claimed being $650.00 and covering rent to become due for two and three-fifths months. Through agreement between the Attorney for the Landlord and the Trustee no effort was made to sell the property distrained or levied on under the attachment; the Trustee was allowed to sell and hold the proceeds subject to the rights of the parties under the levies. By like agreement no judgment was entered on the attachment. Apparently it was assumed that the Landlord's claim for past due and future rent was correct and that the only question was one of liens or priorities.

For the years 1939, 1940 and 1941, the City of Danville assessed the "Furniture and Fixtures" of "Roman's Restaurant", "510 Main Street" at $2,500.00. And on July 2nd, 1941, the City Collector, authorized by the City's charter so to do, distrained all of the property on the leased premises for taxes due the City of Danville as follows: for the year 1939 on furniture and fix-
34 tures and merchants' capital in the sum of $117.24; for the year 1940 on the same in the sum of $57.68, and for the year 1941 on same in the sum of $52.79, a total tax for the three years involved on the furniture and fixtures and merchants' capital of the Restaurant of $226.81. At the same time he distrained on the same property for taxes assessed on other personal property of the Assignor as follows: for the year 1939, $31.19; for the year 1940, $22.95 and for the year 1941, $20.50, a total of $74.64, the aggregate amount distrained for being $300.55.

Assignee delivered possession of the demised premises to the Landlord shortly after July 12, 1941. But I gather from the stipulation that this was done in an effort to reduce the loss by enabling the Landlord to make a lease, if possible, and not with the thought that the Landlord waived its right to the future installments of rent becoming due within the six months specified by the Virginia Statute, except to the extent that rent might have been received during the remainder of that period. No disposition was made of the premises during that time, nor did the Landlord make any use of them or receive any benefit from them.

After deduction of administrative costs already incurred there remains in the hands of the Assignee the sum of $1,407.29. This amount will be further reduced by the costs etc. of this suit. In any event, the funds to be distributed by the trustee will be insufficient to satisfy either the Landlord's claim or that of the United States in full.

With the foregoing facts as the basis of decision, the question is, whether the United States is entitled to priority in distribution. In view of the possibility of personal liabilty on the part

of the Assignee to both the Federal Government under its statutes and to the Landlord under the Virginia Statutes, and the decisions of its court of last resort, the Assignee was placed in a precarious position, and it may be said in passing that a judicial determination of the questions presented was essential, and that, therefore, the expenses incident to the litigation were justifiably incurred. See these Virginia decisions: American Ex. Bank v. Goodlee Realty Corp., 136 Va. 204; Allen v. Parkey, 154 Va. 739 and Kelly v. Worsham, 160 Va. 275.

The right of the United States to priority is fixed at the date of the delivery of the deed of assignment. United States v. Oklahoma, 261 U. S. 253; 43 S. Ct. 295; 67 L. Ed. 638. The claim of the Federal Housing Administration is a claim of the United States. U. S. v. Summerlin, 310 U. S. 414; 60 S. Ct. 1019.

The United States contends that because the Landlord had not levied its distress warrant and attachment until after the date of the delivery of the deed of assignment that its lien for rent was inchoate and, therefore, subordinate to its claim.

Reservations of opinion made in the cases of New York v. McClay, 288 U. S. 290; 46 S. Ct. 176, and United States v. Texas, 62 S. Ct. 350, are so sharply pointed as to cast grave doubt upon the conclusion that the claim of the National Government is inferior to that of any lienor, regardless of what form of lien he holds. It is plain that in order that one holding a lien be satisfied in preference to the United States that his lien must be specific and perfected. Spokane County v. U. S.; New York v. McClay; U. S. v. Texas, supra; U. S. v. Knott, 298 U. S. 544, 56 S. Ct. 902, and U. S. v. Emory, 62 S. Ct. 317.

In U. S. v. Knott, supra, this language is quoted from the opinion in the case of Thellusson v. Smith, 2 Wheat. 396, 4 L. Ed. 271.

"The United States are to be first satisfied, but it then must be out of the debtor's estate. If, therefore, before the right of preference has accrued to the United States, the debtor has made a bona fide conveyance of his estate to a third person, or has mortgaged the same to secure a debt, or if his property has been seized under a fi. fa., the property is devested out of the debtor, and cannot be made liable to the United States."

The quoted language has been a recurring theme in subsequent cases. Close analysis of it would leave the lienholder who comes in conflict with the claim of the United States to priority but little comfort. Taken at its face value it would seem that a species of ownership alone would be sufficient to prevail against the United States. See McClay case, supra, where the charactgristics of a mortgage are discussed. Again the seizure of the property under the writ of fi. fa. as distinguished from the lien arising when it

comes into the officer's hands, the case in Virginia, seems to be made the test. The opinion in the Knott case, supra, without holding that the claim of the United States would be inferior to that of a deed of trust creditor or mortgagee goes on to say that at the least the claimant in opposition to its right of priority must have a specific and perfected lien. Howbeit, answer is called for, and decision must here be made. I conclude that if the Landlord had a specific and perfected lien that it had priority over the claim of the United States. Careful reading of the opinions in the cases of Conrad v. Atlantic Ins. Co., 1 Pet. 386; 7 L. Ed. 189, and Brent v. Bank of Washington, 10 Pet. 596; 9 L. Ed. 547,
36 shows that those decisions did not go quite so far as that in the Thellusson case. In Brent v. Bank, supra, at pages 553, 554, the opinion is expressed that the priorities must be paid out of what comes into the assignee's hands for distribution; that he takes the thing subject to the charge of the lien and that the priorities are applicable to the remnant only.

Then, it must be determined whether under Virginia Law that the Landlord is given a specific and perfected lien for six months' rent accrued and to accrue. Confusion has arisen by reason of expressions in the opinion in the case of American Ex. Bank v. Goodlee Realty Corporation, supra, to the effect that until distraint is made or attachment levied the landlord's lien is inchoate. Although I fully appreciate my temerity in disagreeing with conclusions of the learned and exceedingly painstaking Judge who wrote that opinion, I think it plain that so far as this point was involved, that what he had to say was dictum. Judge Sims was merely extending a courtesy to counsel in answering argument advanced. What he said was not necessary to the decision of the issue made. It is true that the case of Bird v. City of Richmond, 240 Fed. 545, sustains his view of the matter, but as I read it the decision in the case of Anderson v. Henry, 45 W. Va. 319; 31 S. E. 998, is exactly to the contrary. In this connection see the construction placed upon this opinion in In re McIntire, 142 Fed. 593. It is also cited in American and English Encyc. of Law, Vol. 18, p. 332, 2nd Ed., in support of the text reading as follows: "In many jurisdictions the statutes give to the landlord alien on the chattels of the tenant placed on the demised premises."

The opinion in the case of Bradford v. Graham, 287 Fed. 686, contains an able and comprehensive discussion of the Virginia Statutes. What was said in Bird v. City of Richmond, supra, was held to be dictum. The holding in this case clearly is that Sections 5523 and 5524 of the Virginia Code give the landlord a specific and perfected lien. True it is that in that case the landlord was accorded priority under the provisions of Section 64 of

the Bankruptcy Act, but the point under discussion was whether the landlord had a lien which was specific and perfected without distress. The statement found in Burks' Pleading and Practice which was cited in American Ex. Bank v. Goodlee, supra, was considered, and doubt expressed as to its correctness. The case of Geiger v. Harman, 3 Grat. (44 Va.) 130, was the basis for what was said in Burks' Pleading and Practice. This was said in the opinion in that case:

37 "Although the landlord's right to distrain the goods and chattels of his tenant, continues, in some cases, where the said goods and chattels have been removed from the demised premises, yet, the Court is of opinion that the landlord's lien for a year's rent, on the goods and chattels of his tenant, does not extend to protect them from being taken by virtue of any execution, except in cases where the said goods and chattels shall be in, or upon the demised premises."

I fail to see wherein it can be successfully contended that the quoted language affords any good ground for argument that the landlord does not have a lien except in cases where he has actually levied or distrained. Indeed, the import seems to be entirely different and plainly to be that where the goods and chattels are on the demised premises that the landlord has a lien for a year's rent regardless of distraint or levy; a lien which may be lost, however, to that of an execution creditor when the goods have been removed from the demised premises. Since that opinion was written the statute has been amended so that levy or distraint within thirty days after the removal of the goods is given the same effect as if made while they were on the demised premises. This case is also cited by the author of the article on Landlord and Tenant found in American & Eng. Encyc. of Law, supra.

The point in question is also considered in the case of Lott v. Salsbury, 237 Fed. 191. In the opinion it was held that the landlord was given a lien specific and perfected without distress—such a lien as falls within the provisions of Section 67 of the Bankruptcy Act. It quotes as being conclusive of the question from the opinion of Chief Justice Chase in In Re Wynne, 30 Fed. Cases 752, as follows:

"We cannot doubt that this statute creates a lien in favor of the landlord and a lien of high and peculiar character. We have no concern with the policy of this legislation. It is upon the statute books and the lien so created must be respected and enforced. Would it not be trifling with the plain sense of words to say there is a lien under the trust and a lien under the execution, but the claim which by law is made superior to either is no lien?"

And it seems to me that the last sentence of the quotation is the complete and irrefutable answer to the question. Can a deed of trust creditor, or the assignee in a deed of assignment for the benefit of creditors, who under Virginia law are purchasers for value pro tanto (Merchants Bank v. Ballou, 98 Va. 112), and who, therefore, stand in the most favorable position, be subordinated by force of the statute to the landlord's claim, and yet it be said that the landlord has no lien? Certainly, none so far as the claim of the United States is concerned, could conceivably occupy any stronger position than the deed of trust creditor does in Virginia. But as to the goods and chattels of the tenant his position is inferior to that of the landlord. It would be a strange rule which accorded priority to the deed of trust creditor over the claim of the United States and yet denied it to the landlord when the deed of trust creditor is by positive enactment postponed to the landlord's claim.

38

Advertising to the necessity of levy or attachment in order that the landlord may acquire a specific and perfected lien, let us briefly consider Section 5524 of the Virginia Code. At common law the landlord had a right of distress. Plainly there was no intent to take this away from him. The legislation bettered his position. True it is that his common law right to levy the distress himself has been abolished; that certain prerequisites have been prescribed in order that he might distrain his tenant's goods. Some protection was afforded the tenant, but in the final analysis the landlord's position was strengthened. He was provided a summary method for reducing the tenant's goods to money, whereas at common law he merely had a right of detainer. If he was not given a lien by the terms of Section 5524 instead of the mere right to obtain a lien by distress which he had always had, I fail to perceive the reason for the enactment of Section 5524. The opinion in the case of Anderson v. Henry, supra, in its discussion of the West Virginia Statutes, which are in substance the same as those of Virginia ably discusses this phase of the question, and holds that they gave the landlord a lien without levy of distress. I think that in Virginia the landlord is given a lien without distress, as long as the tenant's goods remain on the premises; that the distress, or attachment, in case of future installments of rent, is but the means for enforcing the lien. Confusion seems to have arisen in the distinction between a lien and the remedy for its enforcement. At this day almost all types of lien carry as an incident thereto some method of enforcement, or reducing the thing subject to the charge to money. The point is discussed and the distinction forcibly illustrated in the case of Jas. Morgan v. George W. Campbell, 22 Wall. 381; 22 L. Ed. 796,

where in discussing the Illinois statutes relating to the landlord's lien the Court said: why give the lien if it must be required
39 by distress? That right (distress) had already been given. And the opinion held that as the law then was in Illinois the statute gave a lien; the distress was a means for enforcing it. Of course, the lien may be lost if distraint be not made within the time limits set, but from that it does not follow that conditions precedent were to be met in order that the lien be obtained. Here it is to be noted that distress was had and attachment levied while the goods were on the demise premises. See the case of Jones v. Fidelity & Columbia Trust Co., 73 Fed. (2d) 446, construing Kentucky statutes and holding that they create a lien; that distress is not necessary to its creation, but that failure to levy it within the prescribed periods may result in its divestment.

In Virginia the landlord's lien relates to no particular period of the tenancy, but goes back to its beginning. Wades v. Figgatt, 75 Va. 575. Therefore, the fact that the claim of the United States may have come into existence prior to the time that a part of the rent in question became due the landlord is of no moment.

By Acts of 1940, Chap. 340, Sec. 14c of the Virginia Unemployment Compensation Act was amended to the effect that contributions then or thereafter due shall be paramount and prior to all claims of lien and general creditors, except claims given higher dignity by Federal law, but the section closes as follows: "nor shall anything herein be construed to affect the priority of any mortgage, deed of trust, or other lien duly perfected prior to the date the contributions or any part thereof first accrued." Due to this amendment the decision in the case of W. T. Grant Co. v. Snead, et al., 37 Fed. (2d) 705, has no special bearing on the case. The tenancy having begun long prior to the accrual of the claim of the Commonwealth, the lien of the landlord is prior in time to the claim of the Commonwealth. Wade v. Figgatt, supra. And from what has preceded it follows that in my opinion the landlord's claim is superior to Virginia's.

My conclusion is that as to $222.31 of its claim the City of Danville has priority over both the landlord's lien and that of the United States. That is the amount assessed against "Roman's Restaurant" on its "furniture and equipment", less the tax assessed on its Merchants' Capital, which was $1.50 for each of the three years in question. Section 5524 subordinates the landlord's lien to the lien of taxes. A tax assessed against a specific chattels is a paramount lien thereon and follows it wherever it may be. Chambers v. Higgins, 169 Va. 345; Baugh & Sons v. Drewry,
40 150 Va. 334. The concrete question then is this: were the taxes assessed against the "Furniture and Equipment" of

"Roman's Restaurant", "510 Main Street" assessed against a "specific chattel" or chattels. My search has *lead* me to no authority on the subject, but I think there is an analogue to be found in cases dealing with the sufficiency of the description of property conveyed by chattel mortgages. See Williamson v. Payne, 103 Va. 551. Following that analogy the City would have a specific and perfected lien. The furniture and equipment assessed for taxation had a definite situs and was used in the conduct of a specific business, and I think that it should be regarded as a unit as far as the assessment is concerned. So long as they remained on the premises where the owner's business was conducted, I think they fell within the fair intendment of the Virginia Statutes discussed in the cases last cited. Had they been divided and removed therefrom no doubt different results would have followed. The City's charter gives it the same rights to a lien for taxes as are given the Commonwealth in its Tax Code. See City Charter, Chapter 9, Sec. 1.

The provisions of the deed of assignment contemplate distribution of the proceeds of sale of the property assigned in accordance with the provisions of the Bankruptcy Act. The right of the United States cannot be affected by such provisions. U. S. v. Emery, supra. Nor can those of a lienholder who does not come in under the deed of assignment. Nor do I think that a lienholder is thereby deprived of his rights under State law and required to surrender his lien. To so hold would be in effect to allow a preference of nonlienholders, which is prevented by Section 5278b of the Code of Virginia. Aside from the right to prefer given by local law, which might be exercised in accordance with the bankruptcy law, its provisions cannot control in proceedings in State Courts.

A decree will be entered in accordance with the views herein expressed. Consideration should be given in preparing it to costs and expenses in connection with the present litigation.

HENRY C. LEIGH, *Judge*.

Nov. 19, 1942.

In Corporation Court of City of Danville

Decree

January 5, 1943

41 This cause which has been regularly matured and set for hearing came on this day to be heard upon the separate answers of the United States of America, Unemployment Compensation Commission of Virginia and Waddill, Holland & Flinn, Inc.; and upon the stipulation of facts agreed to by Waddill,

Holland & Flinn, Inc., United States of America, Unemployment Compensation Commission of Virginia and the City of Danville, and was argued by counsel:

Upon consideration whereof it appearing to the Court that the funds now remaining in the hands of the Assignee for distribution among the creditors of Oeland R. Roman, trading as Roman's Restaurant, are insufficient to pay the claim of either the United States of America or Waddill, Holland & Flinn, Inc., in full, and the Court being of the opinion for the reasons set forth in a written opinion filed in this cause and made a part of the papers therein, that the rent claim of Waddill, Holland & Flinn, Inc., is entitled to priority over the claims of the United States of America and the Unemployment Compensation Commission of Virginia, but that it is subordinate to the claim of the City of Danville for taxes in the sum of $222.31, doth so decide; and

The Court doth therefore adjudge, order and decree that Earle Garrett, Assignee, do out of the funds in his hands remaining, after first paying the costs of this suit; any expenses in connection with the execution of his trust yet remaining unpaid; and an attorney's fee to Calvin W. Berry, Esquire, of $100.00 for his services in instituting and conducting this suit, pay the aforesaid sum of $222.31 to the City of Danville; and the residue thereof to Waddill, Holland & Flinn, Inc., to be credited on its claim for rent.

And the United States of America by its counsel having objected and excepted to the entry of this decree and having intimated to the Court its intention to apply to the Supreme Court of Appeals of Virginia for an appeal to this decree, said Assignee is hereby directed and ordered to withhold payment of the amounts hereby decreed to be paid to the City of Danville and Waddill, Holland & Flinn, Inc., until the expiration of four months from the entry of this decree, and if prior to that time no petition has been filed for an appeal, shall forthwith disburse the funds in his hands in accordance with the terms hereof, and if an appeal be granted he shall withhold payment until the disposition thereof by the appellate court.

When payment is made he shall report same to this court with proper receipts covering the same.

And this cause is continued.

42 In Corporation Court of City of Danville

Clerk's certificate

I, C. Stuart Wheatley, Clerk of the Corporation Court of Danville, do hereby certify that the foregoing is a true transcript of so much of the record and judicial proceedings of said Court as I have been directed to copy, together with the original exhibits

hereto annexed, in a certain suit in equity lately pending in said Court between The United States of America, et als., plaintiffs, and Waddill, Holland & Flinn, Inc., et als., defendants.

And I further certify that The United States of America, (originally a party plaintiff in said suit but subsequently dismissed as a party plaintiff and made a party defendant) one of the defendants, has filed with me written notices to Waddill, Holland & Flinn, Inc., City of Danville, Unemployment Compensation Commission of Virginia and Earle Garrett, Trustee, of her intention to apply for a transcript of said record, which notices show on their faces to have been accepted by Crews & Clement, Attorneys for Waddill, Holland & Flinn, Inc., by E. Walton Brown, Attorney for City of Danville, by Kenneth C. Patty, Attorney for the Unemployment Compensation Commission of Virginia, and by Calvin W. Berry, Attorney for Earle Garrett, Trustee.

Given under my hand this 28th day of April, 1943.

C. STUART WHEATLEY, *Clerk*.

Clerk's Fee for Record $12.50.

(No part of which represents tax due the State of Virginia.)

A Copy—Teste:

M. B. WATTS, *C. C.*

43 In Supreme Court of Appeals of Virginia

Richmond

UNITED STATES OF AMERICA, ET AL.

v.

WADDILL, HOLLAND & FLINN, INCORPORATED, ET AL.

January 24, 1944

Record No. 2733

Present, CAMPBELL, C. J., and HUDGINS, GREGORY, BROWNING, EGGLESTON, and SPRATLEY, JJ.

45 Appeal from a decree of the Corporation Court of the city of Danville. Hon. Henry C. Leigh, judge presiding.

Affirmed.

46 The opinion states the case.

Opinion.

EGGLESTON, J., delivered the opinion of the court.

On June 19, 1941, Oeland R. Roman, who operated a restaurant in the city of Danville, executed and delivered to Earle Garrett,

as trustee, a deed of assignment for the benefit of the assignor's creditors. The deed conveyed to the trustee all of the personal property and fixtures which had been used by the assignor in the conduct of the business and which were then located on the premises. It authorized the trustee to sell such personal property and out of the proceeds thereof to "pay as preferred claims such creditors as are given a lien or preference by law, or those having a valid lien upon the property conveyed or some part thereof."

On July 1, 1941, Waddill, Holland & Flinn, Incorporated, the owner of the premises which had been occupied by the assignor, under a written lease for a five-year term, commencing January 1, 1937, and reserving a rental of $250 per month, levied a distress warrant on the assignor's personal property on the premises for accrued rent of $850 for three and two-fifths months. On the same day it levied an attachment on the same personal property for future instalments of rent for two and three-fifths months in the sum of $650.

On July 2, 1941, the Collector of Taxes for the city of Danville distrained the personal property on the premises for personal property taxes assessed thereon for the years 1939, 1940, and 1941, amounting in all to the sum of $222.31.

No sale was held under the distress warrant, attachment, or distraint for taxes, but pursuant to the terms of the deed
47 of trust, the trustee sold the property of the assignor for the sum of $1,680.80, which is conceded to have been the fair value thereof. He then filed in the court below a bill in chancery asking the guidance of the court in determining the priority of payment of the following claims filed with him:

(1) The city of Danville, for the stated taxes due, in the sum of $222.31;

(2) Waddill, Holland & Flinn, Incorporated, for six months' rent due to and to become due, amounting to $1,500;

(3) The United States, for debts due it by the assignor, amounting to $1,554.63, with interest;

(4) The Virginia Unemployment Compensation Commission, for unemployment compensation taxes due it by the assignor, in the sum of $66.38.

The lower court held that the creditors mentioned were entitled to priority in the order listed, and from a decree distributing the fund in that manner, the United States has appealed. It claims that it is entitled to priority of payment of its claim before those of any of the creditors mentioned.

The Virginia Unemployment Compensation Commission assigns cross-error. While it admits that its claim is subordinate to that of the United States, it contends that it should be paid ahead of the city of Danville and Waddill, Holland & Flinn, Incorporated.

Waddill, Holland & Flinn, Incorporated, has filed no cross-assignment of error to the action in subordinating its claim to that of the city of Danville. Hence, the main question before us is whether the lower court was correct in holding that the rent claim of $1,500 was entitled to priority over that of the United States. If that holding is correct, then, admittedly, after the allowance of reasonable costs of administration, the fund will be exhausted. In that case neither the United States nor the Virginia Unemployment Compensation Commission will be interested in the relative priority of the claims of the city of Danville and those of the landlord.

48 The basis for the contention of the United States is section 3466 of the Revised Statutes (31 U. S. C. A., Sec. 191), which is copied in the margin.[1]

[1] It is settled that this statute creates no lien upon the debtor's property in favor of the United States. It merely confers upon the Government a right of priority of payment out of such property in the hands of the debtor's assignees, or their representatives, under the conditions specified in the statute. United States v. Oklahoma, 261 U. S. 253, 259, 43 S. Ct. 295, 67, L. Ed. 638.

[2, 3] The right of the United States, if any, to priority, became fixed at the date of the delivery of the first deed of assignment. United States v. Oklahoma, supra. Thereafter none of the other creditors could obtain preference over the United States. If not preferred at that time, their claims are subordinate to those of the Government. New York v. Maclay, 288 U. S. 290, 292, 53 S. Ct. 323, 324, 77 L. Ed. 754. Hence, the rights of the landlord and the city of Danville must be determined irrespective of the attachment and distraint levied on the debtor's property after the delivery of the deed of assignment.

The landlord does not dispute this principle, but contends that before the right of priority of the United States accrued under U. S. Rev. Stat., Sec. 3466, by the delivery of the deed of assignment, it (the landlord), by virtue of Virginia Code, Section 5524, had acquired a fixed and specific lien upon the property located on the premises for six months' rent, and that, therefore, its claim is superior to that of the Government.

49 There are expressions in recent opinions of the Supreme Court, the final arbiter in the interpretation of an Act of Congress, which support the view that the rights of a creditor

[1] U. S. Rev. Stat., section 3466. "Whenever any person indebted to the United States is insolvent, or whenever the estate of any deceased debtor, in the hands of the executors or administrators, is insufficient to pay all the debts due from the deceased, the debts due to the United States shall be first satisfied; and the priority established shall extend as well to cases in which a debtor, not having sufficient property to pay all his debts, makes a voluntary assignment thereof, or in which the estate and effects of an absconding, concealed, or absent debtor are attached by process of law, as to cases in which an act of bankruptcy is committed."

who holds a "specified perfected lien" on the property of an insolvent, at the time the rights of the Government attach, under Rev. Stat., Sec. 3466, are superior to those of the Government.

In United States v. Knott, 298 U. S. 544, 549, 550, 56 S. Ct. 902, 905, 80 L. Ed. 1321, 104 A. L. R. 741, speaking through Mr. Justice Brandeis, the court said: "* * * But it is settled that an inchoate lien is not enough to defeat the priority. United States v. Oklahoma, 261 U. S. 253, 43 S. Ct. 295, 67 L. Ed. 638; Spokane County v. United States, 279 U. S. 80, 49 S. Ct. 321, 73 L. Ed. 621; New York v. Maclay, 288 U. S. 290, 53 S. Ct. 323, 77 L. Ed. 754. Unless the law of Florida effected, at least as early as the date of insolvency, either a transfer of title from the company, or a *specific perfected lien* in favor of the Florida creditors, the United States is entitled to priority." [Italics supplied.]

In that case it was held (298 U. S., at pages 550, 551, 56 S. Ct., at page 905) that the deposit by a foreign surety company of securities with the State Treasurer, as a condition precedent to its right to do business in the State of Florida, while creating a "trust fund" for the benefit of Florida creditors, constituted "an inchoate general lien" for such purpose, and lacked "the characteristics of a specific perfected lien which alone bars the priority of the United States." See also, United States v. Texas, 314 U. S. 480, 62 S. Ct. 350, 86 L. Ed. 356.

It is true, as argued by the Government, that the Supreme Court has reserved the question as to whether the holder of a specific and perfected lien, without a "change of title or possession," is entitled to priority over the United States Government in the distribution of the estate of an insolvent. See New York v. Maclay, supra (288 U. S., at pages 293, 294, 53 S. Ct., at page 324); United States v. Texas, supra (314 U. S., at page 488, 62 S. Ct., at page 354).

50 [4] However, it seems to us that if before the Government's right of priority attaches, a creditor acquires a specific and perfected lien on the property of the insolvent debtor, the estate of the latter is, for all practical purposes, diminished to the extent of the claim secured by such lien, and the Government's right attaches only to the residue. See Brent v. Bank of Washington, 10 Pet. (35 U. S.) 596, 611, 9 L. Ed. 547.

In Ernst v. Guarantee Millwork, 200 Wash. 195, 93 P. (2d) 404, it was held that where the statute gave the county a "specific lien" on personal property for taxes assessed thereon, such claim was prior to the claim of the United States when the taxpayer thereafter became insolvent.

In Spokane County v. United States, supra (279 U. S., at page 94, 49 S. Ct., at page 325), Mr. Chief Justice Taft said that whether

the lien of State taxes on property of the taxpayer was "specific," is properly "a State question." See also, United States v. Knott, supra (298 U. S., at page 548, 56 S. Ct., at page 904).

The main question for decision, then, is whether, under the law of Virginia, the landlord is given a specific and perfected lien for six months' rent accrued and to accrue, or whether he is given an inchoate lien which becomes specific and perfected only after the levy of a distress warrant or attachment.

[5] At common law the landlord had no lien upon any property of his tenant as security for rent prior to the levy of a distress warrant. 32 Am. Jur., Landlord and Tenant, Sec. 564, p. 461, and authorities there cited. Now the statutes of many States give the landlord a lien for rent upon the property of his tenant and, in case of agricultural lands, upon the crops raised on the demised premises. 32 Am. Jur., Landlord and Tenant, Sec. 575, p. 468.

While there are dicta on the subject, the precise question as to whether such a lien is given by the Virginia statutes,
51 Code, Sections 5519, 5523 and 5524, which are copied in the margin,[2] has not been heretofore presented by this court.

In *Richmond* v. *Duesberry*, 27 Gratt. (68 Va.) 210, 213, 214, this court in speaking of sections 11 and 12 of the Code of 1860, ch. 138 (now Code, Sections 5523 and 5524), said:

"From these sections, it is plain that the intention of the legislature was to secure one year's rent to a landlord against all liens created by the tenant after the lease has commenced.

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[2] SECTION 5519. "Remedy for rent and for use and occupation.—Rent of every kind may be recovered by distress or action. A landlord may also, by action, recover (where the agreement is not by deed) a reasonable satisfaction for the use and occupation of lands. * * *"

SECTION 5523. "On what goods levied.—The distress may be levied on any goods of the lessee, or his assignee, or undertenant, found on the premises, or which may have been removed therefrom not more than thirty days. A levy within such thirty days shall have like effect as if the goods levied on had not been removed from the leased premises. If the goods of such lessee, assignee, or undertenant, when carried on the premises, are subject to a lien, which is valid against his creditors, his interest only in such goods shall be liable to such distress. If any lien be created thereon while they are upon the leased premises, or within thirty days thereafter, they shall be liable to distress, but for not more than six months' rent if the premises are in a city or town, * * * whether it shall have accrued before or after the creation of the lien. * * *" (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

SECTION 5524. "When goods not to be removed without paying six months' rent; lien for taxes, levies, and militia fines not affected.—If, after the commencement of any tenancy, a lien be obtained or created by deed of trust, mortgage, or otherwise, upon the interest or property in goods on premises leased or rented, of any person liable for the rent, or the sale of goods be sold, the party having such lien, or the purchaser of such goods, may remove them from the premises on the following terms, and not otherwise, that is to say: On the terms of paying to the person entitled to the rent so much as is in arrear, and securing to him so much as is to become due, what is so paid or secured not being more altogether than six months' rent if the premises are in a city or town. * * *. If the goods be taken under legal process, the officer executing it shall, out of the proceeds of the goods, make such payment of what is in arrear; and as to what is to become due, he shall sell a sufficient portion of the goods on a credit till then, taking from the purchasers bonds, with good security, payable to the person so entitled, and delivering such bonds to him. If the goods be not taken under legal process, such payment and security shall be made and given before their removal. Neither this nor the preceding section shall affect any lien for taxes, levies, or militia fines. * * *" (As amended by Acts 1922, ch. 495, p. 863; Acts 1932, ch. 357, p. 696.)

52 "The landlord is protected by the statute against all deeds of trust, mortgages, and other liens, where the lien has been created *after* the commencement of the *tenancy*, upon goods on the leased premises which belong to a person *liable for rent*, and where there is an existing liability for rent in arrear, or to become due at the time the lien is created."

In Wades v. Figgatt, 75 Va. 575, 581, 582, it was said that goods of the tenant carried on the leased premises and encumbered after the commencement of the tenancy, "are bound for one year's rent."

In Allen v. Parkey, 154 Va. 739, 748, 149 S. E. 615, 154 S. E. 919, it was held that a trustee in a deed of assignment from the tenant took subject to the provisions of Code, Section 5524, and was bound to pay the landlord six months' rent as a preferred charge, although no distress warrant had issued therefor.

These expressions, and the holding in Allen v. Parkey, supra, would indicate that the landlord has a fixed specific lien on the tenant's goods on the leased premises irrespective of the levy of a distress warrant.

On the other hand, in American Exch. Bank v. Goodlee Realty Corp., 135 Va. 204, 216, 116 S. E. 505, it was said that, "accurately speaking, neither section 5524 nor section 5523 of the present Code * * * gives the landlord any lien for rent," and that until his right has been perfected by the levy of a distress warrant, the landlord's lien is merely "inchoate."

But that statement was not necessary to the decision of the case. There the American Exchange Bank, subsequent to the commencement of the tenancy, acquired a lien on
53 certain goods belonging to the tenant and removed them from the leased premises without paying six months' rent. The court held (135 Va., at page 218) that such removal, in violation of Code, section 5524, was a wrong to the estate of the landlord, for which the latter might maintain an action in tort against the person removing the goods, and recover a personal judgment against him for the value of the goods removed, if not in excess of the amount of one year's rent in arrear, and, if the goods removed were in excess of that amount, then for the amount of the rent in arrear, for one year, and costs. No question as to whether the landlord had a lien on the goods on the leased premises, irrespective of distress, was there involved.

This statement is supported by the cited text in Burks' Pleading and Practice, 1st Ed., section 13, p. 14. The text in the 2d Ed., section 379, pp. 736, 737, and that in the 3d Ed., section 381, pp. 712-714, omits this statement. In a footnote, the 3d Ed., at page 713 says: "It is believed that the ruling in the American Exchange Bank case is correct," but Bradford v. Graham, 287 F. 686, and Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818, are cited as being to the contrary.

In In re Wynne, 30 Fed. Cas. 752, 762, Case No. 18,117, Mr. Chief Justice Chase, sitting on appeal in the United States Circuit Court, reviewed the Virginia statute fully and held that a lien existed thereunder for not exceeding one year's rent, "independently of any proceeding by distress or attachment", which, he said, are merely remedies for enforcing the lien. He said:

"* * * Liens are [of] various descriptions, and may be enforced in different ways; but we think it sufficient to say here, what seems to us well warranted in principle and authority, that whenever the law gives the creditor a right to have a debt satisfied from the proceeds of property, or before the property can be otherwise disposed of, it gives a lien on such property to secure the payment of this debt. And we think that a lien of this sort is given by the 12th section of title 41, chapter 138, of the Revised Code of Virginia, adopted in 1860 (now Code, section 5524). * * *

"We can not doubt that this statute creates a lien in favor of the landlord; and a lien of a high and peculiar character. * * *

"* * * Would it not be trifling with the plain sense of words to say that there is a lien under the trust deed and a lien
54 under the execution, but the claim which by law is made superior to either as a charge upon the goods is no lien?"

In Bradford v. Graham, 287 F. 686, 689, 690, the Circuit Court of Appeals, speaking through Judge Waddill, adopted the reasoning of In re Wynne, supra, and held that Code, sections 5523 and 5524, give the landlord a lien for rent in arrears and to become due for not exceeding one year (now six months) on the property of the tenant on the leased premises, or that which has been removed therefrom within thirty days, without distraint or attachment being made therefor.

Statutes paralleling Virginia Code, sections 5523 and 5524, are found in Michie's Code of West Virginia (1937), sections 3663 and 3668. The highest court of that State, in construing these statutes, has repeatedly held that the landlord has a fixed and specific lien upon the property of the tenant while upon the leased premises, and not merely an inchoate lien.

In Anderson v. Henry, 45 W. Va. 319, 31 S. E. 998, 999, it is said that the statute "gives the landlord right of payment and preference out of the goods themselves, and this operates as a lien. It gives right to the landlord to detain the goods on his premises against a removal of trust until paid and secured as prescribed, just like an innkeeper or tailor may retain goods until payment. If removed under legal process, it says that the officer, though he may remove them, shall, out of the goods, pay rent in arrear, and sell enough on credit to pay the balance when due. Why all this is not a lien, I fail to see. It makes no difference whether a distress

warrant has been sued out or not or can be used out, for want of maturity of the rent." The court concludes (31 S. E., at page 1000) that section 12, ch. 93, of the Code of 1891 (now Michie's Code of West Virginia (1937), section 3668, which corresponds to Virginia Code, section 5524), "of its own force gives a lien without a distress warrant."

It is significant to note that the West Virginia court supports its reasoning by citing Wades v. Figgatt, supra, and Richmond v. Duesberry, supra, and points out that the Virginia and West Virginia statutes are substantially the same.

The holding that the landlord has a fixed and specific lien, and not merely an inchoate lien, irrespective of the levy of a distress warrant, has been reaffirmed by the West Virginia court in Huffard v. Akers, 52 W. Va. 21, 43 S. E. 124, 127; Thomas Co. v. Lewis, etc., Co., 79 W. Va. 138, 141, 90 S. E. 816, 818.

We may observe in passing that in 18 Am. & Eng. Enc. of Law, Landlord and Tenant, p. 332, note 5, and in 36 Corpus Juris, Landlord and Tenant, section 1447, p. 487, note 53, and in 9 A. L. R. 300, Virginia and West Virginia are classed among those States whose statutes give the landlord a lien on the property of the tenant.

[6] We agree with the reasoning of Mr. Chief Justice Chase in In re Wynne, supra, and that of the West Virginia court, that the Virginia statutes, by clear implication, give the landlord a lien which is fixed and specific, and not one which is merely inchoate, and that such a lien exists independent of the right of distress or attachment, which are merely remedies for enforcing it.

[7] It follows from what we have said that the lower court was right in holding that the claim of the landlord, Waddill, Holland & Flinn, Incorporated, was entitled to priority of payment over that of the United States.

[8, 9] We are further of opinion that the lower court correctly held that Code, section 5524, subordinated the landlord's lien to the lien of the city of Danville for its personal property taxes assessed against the specific chattels on the leased premises. That the city has a lien therefor is settled in this State. Chambers v. Higgins, 169 Va. 345, 351, 193 S. E. 531, 533; Drewry v. Baugh & Sons, 150 Va. 394, 401, 143 S. E. 713.

Whether the city's lien for taxes is such a specific lien as would entitle it to priority of payment over the claim of the United States, if no rent claim were here involved, we need not decide. Cf. Spokane County v. United States, supra; Ernst v. Guarantee Millwork, supra. Since the rent claim takes priority over that of the United States, and completely exhausts the fund, the United States has no concern in the relative priority of the claim of the city and that of the landlord.

The Virginia Unemployment Compensation Commission contends that it is entitled to priority of payment over the claim of the landlord by virtue of section 14 (c) of the Virginia Unemployment Compensation Act (Acts 1936–7, Ex. Sess., ch. 1, p. 3, as amended by Acts 1940, ch. 334, p. 550; Acts 1942, ch. 317, p. 446; Michie's Code of 1942, sec. 1887 (106) (c)), which makes payroll taxes a lien against an employer's assets. However, that section expressly preserves the priority of "any mortgage, deed of trust or other lien duly perfected prior to the date the contributions or any part thereof first accrued."

[10] We are of opinion that the lien of the landlord is a "lien duly perfected" within the meaning of this section. It is settled that the landlord's lien relates back to the beginning of the tenancy. Wades v. Figgatt, supra; Pepsi-Cola Bottling Co. v. Indian Rock Bottling Co., 98 W. Va. 269, 126 S. E. 715; Dingess-Rum Coal Co. v. Draper Eagle Coal Co., 108 W. Va. 37, 150 S. E. 228; 32 Am. Jur., Landlord and Tenant, sec. 579, p. 470. Therefore it was perfected prior to the accrual of the Commission's claim for contributions.

What we have said in disposing of the claim of the United States applies here in consideration of the claim of the Unemployment Compensation Commission. Since the rent claim takes priority over that of the Unemployment Compensation Commission, and completely exhausts the fund, the Unemployment Compensation Commission is not concerned with the relative priority of the claims of the landlord and the city of Danvile.

In our opinion the decree complained of is plainly right, and accordingly it is affirmed.

57 In Supreme Court of Appeals of Virginia

Record No. 2733

UNITED STATES OF AMERICA, APPELLANT

v.

WADDILL, HOLLAND & FLINN, INCORPORATED, TRADING AS HOTEL BURTON, EARLE GARRETT, TRUSTEE UNDER GENERAL DEED OF ASSIGNMENT FROM MRS. OELAND R. ROMAN, TRADING AS ROMAN'S RESTAURANT, VIRGINIA UNEMPLOYMENT COMPENSATION COMMISSION AND CITY OF DANVILLE, APPELLEES

Upon an appeal from and supersedeas to a decree entered by the Corporation Court of the city of Danville on the 5th day of January 1943.

Judgment.

January 24, 1944

This day came again the parties, by counsel, and the court having maturely considered the transcript of the record of the decree aforesaid and arguments of counsel, is of opinion, for reasons stated in writing and filed with the record, that there is no error in the decree appealed from. It is therefore adjudged, ordered, and decreed that the same be, and is hereby affirmed, and that the appellant pay to the appellees thirty dollars damages and also their costs by them expended about their defense herein.

Which is ordered to be certified to the said corporation court.

58 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE 1944

Supreme Court of the United States

Order allowing certiorari

Filed May 29, 1944

The petition herein for a writ of certiorari to the Supreme Court of Appeals of the Commonwealth of Virginia is granted and the case is transferred to the summary docket.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1944